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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13 **SOUTHERN DIVISION**

14 O.S. SECURITY LLC,
15 Plaintiff,
16 vs.
17 SCHLAGE LOCK
18 COMPANY LLC,
19 Defendant.

Case No. SACV14-00319 AG (DFMx)

Honorable Andrew J. Guilford

20 **OS SECURITY'S MOTION**
21 **FOR LEAVE TO SERVE A**
22 **SUPPLEMENTAL EXPERT**
23 **REPORT RE**
24 **INFRINGEMENT**

25 HEARING:

26 Date: September 14, 2015

27 Time: 10:00am

28 Ctrm: 10D

Discovery Cut-Off: July 27, 2015

Pre-Trial Conference: February 1, 2016

Trial Date: February 16, 2016

1 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF
2 RECORD:

3 PLEASE TAKE NOTICE that on September 14, 2015 at **10:00 a.m.**, in
4 Courtroom 10D of the above-entitled Court, located at 255 East Temple Street, Los
5 Angeles, California 90012, Plaintiff O.S. Security LLC (“OSS”) will and hereby
6 does move the Court pursuant to Local Civil Rule 7-3 (“L.R.”) and the Court’s
7 Standing Patent Rule 4-3, to grant Plaintiff OSS leave to serve a supplemental
8 expert report regarding infringement.

9 This Motion is made following the conference of counsel pursuant to L.R. 7-
10 3 which took place on July 24, 2014. The Motion will be based on this Notice, the
11 memorandum by OSS as well as any supporting declarations and exhibits, the files
12 and records in this action, and any further evidence or argument that this Court
13 may properly receive at or before the hearing.

14
15 Dated: August 14, 2015

Respectfully submitted,

17 MISHCON DE REYA NEW YORK LLP

18
19 By: /s/ John F. Petrusic
John F. Petrusic

20 NEWPORT TRIAL GROUP
21 Tyler J. Woods

22 Attorneys for Plaintiff
O.S. SECURITY LLC

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1 **I. INTRODUCTION**

2

3 Approximately three weeks ago, Defendant Schlage finally produced core

4 technical documents which describe the operation and functionality of products

5 which had been accused of infringement in this case since July of 2014. These

6 documents confirmed OSS's contentions that the accused products infringe the

7 patents-in-suit. (Kattamis Decl.,¹ ¶ 3). OSS had originally requested these

8 documents in October of 2014, a request which had been the subject of a discovery

9 dispute since April of this year. Schlage's strategy of constant obstruction

10 succeeded in delaying the production of these documents until the final week of

11 fact discovery. As a result, Plaintiff OSS was forced to submit both final

12 infringement contentions and expert reports without these core technical

13 documents in hand. Until this recent production, Schlage's production has been

14 limited to the CO-200 product.² Consequently, the parties' expert reports

15 addressed only that product. As OSS has finally obtained documents which should

16 have been produced several months ago, OSS now moves this Court to serve a

17 supplemental infringement expert report pursuant to Judge Guilford's Standing

18 Patent Rule 4.3, addressing certain remaining accused products. Specifically, OSS

19 intends to address the remaining products in the CO series of locks the products in

20 the AD series of locks. (Kattamis Decl., ¶ 3).

21 OSS has good cause to serve a supplemental expert report addressing the

22 core technical documents recently produced by Schlage as it would have been

23 impossible to supplement its infringement report prior to Schlage's production of

24

25 ¹ Kattamis Decl. refers to *Declaration of Dr. Alex Kattamis In Support of Plaintiff's Motion For*

26 *Leave To Serve A Supplemental Expert Report Re Infringement*.

27 ² Although Schlage produced documents regarding the remaining accused products, they

28 continue to refuse to provide source code for those products despite source code being called for by OSS's Request No. 3, which this Court ordered Schlage to respond to. Schlage has also refused to provide a witness on these products in response to OSS's 30(b)(6) deposition notice.

1 the core technical documents. Schlage will not be prejudiced in any manner by
2 OSS's supplemental expert report. If Schlage had timely produced the documents
3 that OSS had requested in October of 2014, OSS's expert report would have
4 addressed those documents in its initial expert report. Schlage would have then
5 responded to OSS's report in due course. Thus, responding to OSS's supplemental
6 expert will only require Schlage to do what it would have done earlier if Schlage
7 had not belatedly produced core technical discovery in this case.

8 Of utmost importance is that OSS's supplemental expert report will accuse
9 no new products and advance no new theories of infringement. The report will
10 simply identify specific evidence, based on Schlage's recently produced
11 documents, which demonstrate how the accused products infringe the patents-in-
12 suit under the theories laid out in OSS's preliminary infringement contentions.
13 (Kattamis Decl., ¶ 4).

14 OSS does not believe its infringement contentions require supplementation
15 as both the preliminary and final contentions list all of the accused products and
16 lay out all of the theories of infringement being asserted by OSS. If the Court,
17 however, feels supplementation of the infringement contentions would be the
18 proper vehicle to identify the specific evidence of infringement, OSS is not
19 opposed to supplementing its contentions. The end result will be the same as the
20 whether the infringement contentions or expert reports are supplemented, OSS will
21 simply identify additional evidence supporting its theories of infringement laid out
22 in its preliminary infringement contentions.

II. FACTUAL BACKGROUND

Although OSS's previous papers³ have identified events and dates key to this motion, OSS summarizes those facts for the convenience of the Court. On March 3, 2014, Plaintiff O.S. Security LLC ("OSS") initiated the present action against Defendant Schlage Lock Company LLC ("Schlage") after discovering that Schlage's electronic locks infringe seven of its patents. Pursuant to the Court's Standing Patent Rules ("S.P.R.") 2.1.3, OSS provided Defendants' counsel OSS's Preliminary Infringement Contentions ("PICs") on July 11, 2014. The PICs included a main document, which in turn referred to seven attached charts mapping the accused products to each of the patents-in-suit. *See, generally*, Petrsoric Decl.⁴, Ex. C, Preliminary Infringement Contentions and Exhibits Schlage001-Schlage007. In the attached charts, for each patent-in-suit, OSS identified the specific accused products believed to be infringing and stated the basis for its belief that each product infringed. *See, generally*, Petrsoric Decl., Ex. C, Preliminary Infringement Contentions at Exhibits Schlage001-Schlage007, p. 1. In particular, OSS's PICs identified the CO-Series of products, the AD series of products, the FE series of products and Nexia compatible locks with specific reference to the model numbers alleged to be infringing. *Id.* at Exhibit Schlage001, p. 1, Schlage002, p. 1, Schlage003, p. 1, Schlage004, p. 1, Schlage005, p. 1, Schlage006, p. 1, and Schlage007, p. 1.

On October 14, 2014, OSS served its First Set of Requests for Production of Documents ("RFPs"). *See* Petrsoric Decl., Ex. A, OSS First Set of Document Requests. OSS defined the term "Electronic Access Control Device" by specific reference to each of the accused devices identified in its S.P.R. 2.5 disclosures and

³ See generally Joint Stipulation re Plaintiff's Motion to Compel Production of Documents, D.I. 82; OS Security's Opposition to Schlage's Objections to Judge McCormick's Order, D.I. 110.

⁴ Petrsoric Decl. refers to D.I. 83, *Declaration of John F. Petrsoric In Support of Plaintiff's Motion To Compel Production of Documents* and the exhibits.

1 further expressly referenced the specific aspects and elements of the accused
2 devices in its definition. *Id.* at 8 (¶21). On January 5, 2015, Schlage served its
3 objections and responses to OSS's RFPs. Petrsoric Decl., Ex. B, Schlage
4 Responses and Objections to OSS First Set of Document Requests. In its general
5 objections and responses, Schlage indicated that it would produce documents "only
6 in connection with the model identified as being at issue in OSS's Disclosure of
7 Asserted Claims and Infringement Contentions under S.P.R. 2, i.e., the CO-200
8 series lock." *Id.* at 2-3 (¶3). The statement that OSS's infringement contentions
9 only identified the CO-200 series lock as being at issue is plainly false. Based
10 upon its factually inaccurate general objection, in response to Document Request
11 Nos. 3, 7-19, 32-34, and 37 Schlage refused to produce documents regarding the
12 vast majority of accused products and, instead, only agreed to produce documents
13 related to the CO-200 lock. *Id.*

14 On April 20, 2015, pursuant to OSS's request for a meet and confer
15 (Petrsoric Decl., Ex. D, April 10, 2015 Letter), the parties' met and conferred
16 regarding Schlage's refusal to produce documents regarding the majority of
17 accused products. On May 12, 2015, after Schlage continued to refuse to produce
18 documents, OSS moved to compel Schlage to produce documents regarding each
19 accused products identified in its infringement contentions.

20 On June 5, 2015, Judge McCormick ordered Schlage to produce the
21 requested responsive technical documents by June 19, 2015. On June 19, 2015, the
22 day its Court ordered production was due, Schlage produced no documents.
23 Instead, on that date, Schlage filed its objections to the Magistrate's order with this
24 Court. The June 19 production deadline passed without the Court issuing a stay or
25
26
27
28

Schlage producing a single document, placing Schlage in violation of Local Rule 72-2.⁵

On July 20 Judge Guilford held a hearing and affirmed Judge McCormick's Order for Schlage to produce technical documents regarding the accused products. On July 22 and 23, Schlage produced these documents. With four days remaining in fact discovery, OSS requested that Schlage agree to suspend depositions until the documents could be examined and OSS could determine whether to pursue claims on infringement against these products. Schlage refused. (Gupta Decl.⁶, Ex A, July 24 Email from Jeff Barron). OSS then acknowledged that Schlage disputed whether the accused products for which they had been ordered to produce technical documents were indeed part of the case, and suggested the parties jointly submit a motion to this Court to obtain a final ruling on the issue. Again, Schlage refused. (Gupta Decl., Ex B, July 24 Email from John Petrsonic). Finally, OSS suggested that discovery be suspended until OSS could file a Motion to Supplement Expert Reports in accordance with the local rules. Once again, Schlage refused. (Gupta Decl., Ex A,). Instead, Schlage insisted on proceeding with expert depositions during the final days of fact discovery and refused to provide any remaining discovery, now that fact discovery was closing. (Gupta Decl., Ex C, July 22 Email from Jeff Barron).

III. APPLICABLE LAW

Judge Guilford's Standing Patent Rules require that supplemental expert reports require obtaining "prior leave of court upon a showing of good cause that

⁵ Although the Court declined to sanction Schlage, Judge Guilford agreed with OSS that under Local Rule 72-2.2, Schlage had indeed disregarded a Court order. Judge Guilford's June 26, 2015 Order, D.I. 109 at 3.

⁶ Gupta Decl. refers to *Declaration of Sachin K. Gupta In Support of Plaintiff's Motion For Leave to Serve a Supplemental Expert Report Re Infringement* and exhibits.

1 the amendment or supplementation could not reasonably have been made earlier
 2 and that the opposing party is not unfairly prejudiced.” S.P.R. 4.3. The “good
 3 cause” standard under the Federal Rules of Civil Procedure primarily considers the
 4 diligence of the party seeking the amendment.” *Johnson v. Mammoth Recreations,*
 5 *Inc.*, 975 F.2d 604, 608 (9th Cir. 1992) (interpreting the good cause standard of
 6 Rule 16(b). Similarly, “[t]he ‘good cause’ requirement under S.P.R. 4.2 for
 7 amendment requires a showing of diligence. *Mortgage Grader, Inc. v. Costco*
 8 *Wholesale Corp.*, No. 13-0043-AG (ANx), slip op. at 3 (C.D. Cal., Oct. 27, 2014).

10 **IV. ARGUMENT**

11 **A. The Subject Of OSS’s Supplemental Expert Report Are** 12 **Products Which Have Been Accused Of Infringement Since** 13 **The Early Stages Of This Case.**

14 The accused products which are the subject of the supplemental expert
 15 report OSS seeks to serve were all listed in OSS’s preliminary infringement
 16 contentions, served on Schlage on July 11, 2014. Schlage has claimed and no
 17 doubt will continue to claim that OSS is accusing these products of infringement
 18 for the first time. However, this assertion is exposed as blatantly false by simply
 19 examining OSS’s preliminary infringement contentions, which list all of the
 20 accused products in question. Judge McCormick recognized as much during the
 21 hearing regarding OSS’s motion to compel. “I don’t think it’s accurate to say that
 22 this issue wasn’t out there because it has been out there.” (Gupta Decl., Ex. D, June
 23 2 hearing transcript before Magistrate Judge McCormick). Indeed, Schlage has
 24 consistently attempted to obfuscate this fact by repeatedly referring to these
 25 products as “new products” or products that OSS is “accusing on infringement for
 26 the first time.” (*Id.*). This is simply not the case and Schlage’s persistent
 27 mischaracterization of the accused products as “new” does not change their true
 28

1 nature. *See Zest IP Holdings, LLC v. Implant Direct Mfg. LLC*, No. 10-cv0541,
2 2014 WL 815453, at *2 (S.D. Cal. Mar. 3, 2014).

3 In fact, Schlage acknowledges the Accused Products were indeed listed in
4 OSS's preliminary infringement contentions. (D.I. 82 at 19). However, Schlage
5 reasons that because Schlage felt OSS's infringement contentions beyond the CO-
6 200 product were not sufficient, the remaining products were somehow no longer
7 accused. This reasoning is based on a faulty understanding of the law and of the
8 purpose of infringement contentions. "The purpose of infringement contentions is
9 to provide the defendant with notice of the plaintiff's theories of infringement
10 beyond what is disclosed in the complaint." *STMicroelectronics, Inc. v. Motorola,*
11 *Inc.*, 308 F. Supp. 2d 754, 755 (E.D. Tex. 2004). OSS did precisely this, as it laid
12 out element by element, how it believes the accused products infringe the patents-
13 in-suit based on an analysis of the CO-200 product. *See ParkerVision v.*
14 *Qualcomm, Inc.*, No. 14-0687, slip op. at 5-6 (M.D. Fla. Aug. 11, 2015) (finding
15 that infringement contentions mapping Qualcomm products were sufficient to put
16 Defendant on notice of the same theory of infringement for similar non-Qualcomm
17 products). Furthermore, as OSS has explained in its previous motion to compel for
18 the Court, not only did Schlage never once move to strike OSS's preliminary or
19 final infringement contentions, Schlage rebuffed OSS's attempts to work with
20 Schlage to determine what additional notice it felt it required regarding OSS's
21 infringement theories. (Petrsonic Decl., Ex. F).

22 In *Fenner Investments, Ltd., v. Hewlett-Packard Co.*, plaintiff accused
23 defendant's Blade servers of infringement. Plaintiff's infringement contentions
24 stated these servers used tools such as Windows Server 2003 and mapped the
25 claims to the use of Windows 2003. No. 08-0273, 2010 WL 786606, at *3
26 (E.D.Tex. Feb. 26, 2010). The court rejected defendant's claims that the scope of
27 infringement was limited to Windows Server 2003 as the contentions placed
28 defendant on notice regarding plaintiff's theory of infringement regardless of

1 which tool was used. “If Defendants were unclear as to the scope of the
 2 contentions, it was their responsibility to work with Plaintiff, informally or through
 3 motion practice, to clarify the issue.” *Id*; see also *Verinata Health, Inc. v.*
 4 *Sequenom, Inc.*, 2014 U.S. Dist. LEXIS 116382 (N.D. Cal., Aug. 20, 2014)
 5 (quoting *Fenner Investments*). In this case, OSS’s contentions were even clearer as
 6 they *explicitly* listed each accused product in the preliminary infringement
 7 contentions.

8 Like the defendant in *Fenner Investments*, Schlage never filed motions to
 9 obtain more detailed contentions and never worked with OSS, even when OSS
 10 offered to discuss Schlage’s concerns with the contentions. (Petrusic Decl., Ex.
 11 F). “A defendant cannot lay behind the log until late in the case and then claim it
 12 lacks notice as to the scope of the case or the infringement contentions.” *Orion IP*
 13 *LLC v. Staples, Inc.*, 407 F.Supp.2d 815, 818 (E.D.Tex.2006). Any belated
 14 complaints by Schlage regarding OSS’s contentions does not render products that
 15 were accused in its Preliminary Infringement Contentions somehow “new
 16 products”. OSS put Schlage on notice of its infringement theories regarding the
 17 Accused Products from the early stages of this case and then diligently pursued
 18 discovery regarding those documents.

19 **B. OSS Has Diligently Pursued The Production Of Core**
 20 **Technical Documents Necessary For Its Supplemental**
 21 **Expert Report**

22 Technical documents regarding the products accused of infringement on July
 23 11, 2014 were requested in OSS’s first set of requests for production, served on
 24 October 27, 2014. In December of 2014, OSS transitioned to new counsel as its
 25 previous counsel’s practice ceased to operate. Current counsel for OSS first
 26 appeared in this case on December 12, 2014. Shortly after, the parties began the
 27 claim construction process and submitted their joint claim construction statement
 28

1 to the Court on January 9, 2015. A few days before that on January 5, 2015,
2 Schlage served its responses to OSS's first set of requests for production.

3 Once this Court's claim construction order issued on March 16, 2015, OSS
4 was able to determine which claims on which products would remain in the case,
5 OSS resumed seeking the documents Schlage had failed to produce to date. OSS
6 contacted Schlage on April 10 to inquire as to why these documents had not been
7 produced, despite the clarity provided by the Courts claim construction order.
8 (Petrsonic Decl., Ex. D). Once it became clear Schlage was refusing to provide any
9 of the requested discovery, OSS promptly filed a motion to compel, which Judge
10 McCormick recognized as "plainly timely." (D.I. 91 at 2, Order by Magistrate
11 Judge Douglas F. McCormick).

12 While Schlage did everything it could to delayed the resolution of this
13 dispute and push the production of the requested documents as close to the close of
14 fact discovery as possible, OSS continued to attempt to resolve this discovery
15 dispute as expeditiously as permitted under the local rules. When Schlage ignored
16 the deadline set by Judge McCormick's order and failed to properly seek a stay of
17 that order, directly violating Local Rule 72-2.2, OSS filed an ex parte application
18 informing the Court of this violation and requesting immediate compliance with
19 Judge McCormick's order. Although Judge Guilford agreed that Schlage had
20 indeed violated Judge McCormick's order, he declined to sanction Schlage at that
21 time. Judge Guilford did, however, order that Schlage be prepared to produce the
22 request documents within two days of him issuing his final order.

23 Schlage's tactful manipulation of local rules which were designed to facilitate
24 cooperation allowed it to impose a delay of nearly three and a half months before
25 OSS was able to obtain the documents it was entitled to receive. In face of these
26 delays by Schlage, OSS consistently diligently pursued the production of these
27 documents and obtained them as soon as the local rules permitted it to do so.

C. Supplemental Expert Reports Will Not Prejudice Schlage As Schlage Will Only Be Required To Do Now What It Would Have Done Earlier

Schlage will suffer no prejudice by having to respond to an expert report that it would have responded to earlier had it not managed to delay the production of core technical documents for so long. OSS is not introducing any new theories or adding new products to the case. In fact, the hardware design of the products that Dr. Kattamis will further opine on is identical to that of the CO-200. (Kattamis Decl., ¶ 4). Indeed, after reviewing the recently produced technical documents from Schlage, OSS intends to drop certain products that were listed in its infringement contentions from this case.

Additionally, in an effort to preserve the resources of both parties, OSS has carefully avoided prematurely taking expert depositions until the both sides' experts have had an opportunity to opine on the remaining accused products in this case.⁷ Consequently, Schlage will not be required to re-depose OSS's expert witness as the deposition has not yet taken place. All that will be required from Schlage following service of OSS's supplemental expert report is what would Schlage would have been required to do in the normal course of defending this case and does not amount to prejudice. *Cf. Aten Int'l Co. v. Emine Tech. Co.*, 2010 U.S. Dist. LEXIS 46226, *15 (C.D. Cal. Apr. 12, 2010) (finding in the context of a motion to amend, that "[defendant's] alleged prejudice amounts to defending a lawsuit, and certainly doesn't rise to the level of prejudice required to prohibit [plaintiff] from amending their complaint."

Finally, Schlage will not even be subject to any amount of delay. Trial in this case is not scheduled until February 16, 2016, over seven months from now.

⁷ Although damages expert depositions have already taken place, they did so only at Schlage's insistence. (Gupta Decl., Ex. B). In any event, OSS does not foresee a need to re-depose the parties' damages experts after the supplemental technical expert reports are served.

1 There is more than an adequate amount of time for parties to serve supplemental
2 expert reports and complete expert depositions. As OSS is simply advancing the
3 same theories of infringement that it has set forth since the early stages of this case,
4 none of the parties' discovery efforts to date will be squandered. Granting OSS
5 leave to serve a supplemental expert report addressing the recently produced core
6 technical documents will not prejudice Schlage in any manner.

7
8 **V. CONCLUSIONS**

9 For the foregoing reasons, OSS respectfully requests the Court grant OSS
10 leave to file a supplemental expert report addressing evidence supporting its
11 infringement claims for certain accused products.

12
13
14 DATED: August 14, 2015

Mishcon de Reya New York LLP

15 By: /s/ John F. Petrsoric
16 John F. Petrsoric

17 NEWPORT TRIAL GROUP
18 Tyler J. Woods

19 Attorneys for Plaintiff
20 O.S. SECURITY LLC

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2015, the foregoing document was filed electronically via the Court's Electronic Case Filing System (ECF). Notice of the filing is being served upon all counsel of record automatically through Notice of Electronic Filing.

/s/ John F. Petrsoric
John F. Petrsoric